FOREIGN POLICY REPORTS

April 10, 1935

American Neutrality in a Future War

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PUBLISHED FORTNIGHTLY BY THE

Foreign Policy Association, Incorporated

EIGHT WEST FORTIETH STREET, NEW YORK, N. Y.

VOLUME XI NUMBER 3 *25¢ a copy* *$5.00 a year*

American Neutrality in a Future War

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with the Aid of the Research Staff of the Foreign Policy Association

INTRODUCTION

CAN the United States remain neutral in the event of another major war? This question has been repeatedly asked in Congress, in the press, and in the conversations of millions of Americans since Germany denounced the military clauses of the Versailles treaty on March 16, 1935. Although a European war may not prove inevitable in the immediate future, the United States is compelled by the gravity of the crisis to face an issue which is no longer academic or remote, but practical and urgent. Resolutions calling for embargoes on arms and loans to all belligerents in time of war have already been discussed in Congress, while the Department of State has pressed forward with a survey of American neutrality laws.

The proposals so far advanced have revealed a sharp difference of opinion over the nature of neutral rights and obligations and the future of neutrality. While supporters of a new world order assert that the League of Nations and the Kellogg pact have destroyed the idea of neutrality, many distinguished international lawyers insist that neutral rights and obligations remain much as they were in 1914. A third group contends that, although neutrality is not legally dead, in practice preservation of American neutrality will prove all but impossible in a future war. This group argues that if the United States wishes to avoid being drawn into another conflict, it must be prepared to relinquish many of the neutral "rights" it has claimed in the past.

This report undertakes to provide a factual background for discussion of the possible alternatives confronting the United States. Was neutrality made illegal by the League Covenant or the Kellogg pact? Is neutrality desirable in the light of post-war conceptions of international solidarity? Is neutrality possible under modern conditions of warfare? More particularly, should the United States (1) adhere to the classical concept of neutrality, (2) declare that it will not interfere with League sanctions against an "aggressor," or (3) subject itself to restrictions which, although not legally required under the classical concept of neutrality, would in practice make it possible for this country to remain neutral?

NEUTRAL RIGHTS AND MARITIME LAW

Neutrality may be defined as the legal status created by the abstention of a state from all participation in a war, the maintenance by it of an attitude of impartiality in its dealings with belligerents and, correspondingly, the recognition by belligerents of this abstention and impartiality.[1] The principles of neutrality have arisen out of a long historic controversy between belligerents and neutrals.

In the armed neutralities of 1613, 1780 and 1800 some of the neutral countries of Europe organized to defend their neutral rights against belligerent encroachment, if necessary by force of arms. They sought to defend the rules of neutrality—e.g., that neutrals might trade in war as in peace, except in contraband or with blockaded ports; that blockades should be effective in order to be binding; and that these principles should be applied in prize courts.

1. Cf. L. F. Oppenheim, *International Law* (London, Longmans, 1926, 4th edition, ed. by McNair), Vol. 2, p. 475.

FOREIGN POLICY REPORTS, VOLUME XI, NUMBER 3, APRIL 10, 1935

Published by-weekly by the FOREIGN POLICY ASSOCIATION, Incorporated, 8 West 40th Street, New York, N. Y., U. S. A. RAYMOND LESLIE BUELL, *President;* WILLIAM T. STONE, *Vice President and Washington representative;* VERA MICHELES DEAN, *Editor;* HELEN TERRY, *Assistant Editor. Research Associates:* T. A. BISSON, VERA MICHELES DEAN, WILLIAM KOREN, JR., HELEN H. MOORHEAD, DAVID H. POPPER, ONA K. D. RINGWOOD, CHARLES A. THOMSON, M. S. WERTHEIMER, JOHN C. DEWILDE. Subscription Rates: $5.00 a year; to F. P. A. members $3.00; single copies 25 cents. Entered as second-class matter on March 31, 1931 at the post office at New York, N. Y., under the Act of March 3, 1879.

Neutral insistence that belligerents justify their interference with neutral trade in court served to clarify and delimit the rights and obligations of neutrals and belligerents. When a neutral vessel was seized for alleged carriage of contraband or some other offense it was "put in prize." That is, the captor was compelled to prove before a prize court that the capture was justified under international law. The prize court was a court established by the belligerent country in which it sat, but the substance, although not the form, of the law it was supposed to apply was international law.[2] A significant contribution to the development of neutrality was made by this country under Washington and Jefferson. The United States insisted that belligerents should respect its neutral rights in return for its fulfillment of the duties of neutrality.[3]

During the Napoleonic wars the impartial decisions of the famous British admiralty judge, Sir William Scott (later Lord Stowell), greatly assisted in restraining belligerent pretensions and in creating an established legal status for neutrals. The belligerents, however, disregarded the laws of contraband and blockade, and attempted to revive the older practice of banning all commerce with the enemy. The United States was forced into the war of 1812 largely because of British disregard of neutral rights in the minor matter of impressment. A half-century later the leading powers of Europe signed the Declaration of Paris of 1856 which practically codified maritime law on four important points involving the protection of private property of neutrals.

Similar attempts at codification were made at the two Hague Conferences in 1899 and 1907. The unratified Convention XII of the 1907 Hague Conference provided for the establishment of an International Prize Court to serve as a Court of Appeal from the decisions of prize courts of belligerents. The fact that a neutral was forced to plead his claim before a court of the belligerent which had captured his property was considered unsatisfactory. Although the prize courts claimed that they applied international law, in fact they frequently applied their own interpretation of international law; and when municipal statutes or Orders in Council bound the court to rules conflicting with international law, the opportunity to administer international law practically ceased to exist.

2. In a strict sense prize courts apply municipal, not international, law. The substance of the law is the court's interpretation of international law, but in form it is municipal law which has adopted, as its own, portions of international law. Cf. C. C. Hyde, *International Law* (Boston, Little, Brown, 1922), Vol. 2, p. 802 ff. Oppenheim, *International Law*, cited, Vol. 2, p. 708.

3. Cf. *Policy of the United States toward Maritime Commerce in War*, prepared by Carlton Savage (Washington, Department of State, 1934), Vol. I, *1776-1914*.

THE DECLARATION OF LONDON, 1909

Many countries were opposed to the establishment of an International Prize Court until there was a clear understanding as to the law to be applied. The British government, therefore, proposed a conference on the subject. This conference met in London in 1908-1909 and attempted to codify international maritime law. Each country was asked to prepare a memorandum setting forth its view as to the correct rule of international law on certain suggested points.

The ensuing Declaration of London was in the main a restatement of the rules of international maritime law as they existed in 1909.[4] It did not materially depart from Anglo-American conceptions of the legal relations between belligerents and neutrals. Such a codification was bound to contain certain compromises which were for some nations new rules rather than principles to which they had previously given their tacit consent. For various reasons ratifications of the Declaration of London were never exchanged.

Immediately after the outbreak of the World War the United States asked the chief belligerent powers whether they would agree to be bound by the provisions of the Declaration of London during the war, provided such agreement were reciprocal. Acceptance of these provisions, said the United States, would prevent the possibility of grave misunderstandings in relations between belligerents and neutrals. Germany and Austria accepted the proposal, and agreed to be bound by the rules in question on condition of reciprocity. Great Britain, France and Russia replied that they had decided to adopt, generally, the rules of the Declaration of London, subject to certain modifications which they deemed indispensable to their belligerent interests. Since Article 65 of the Declaration of London stated that its provisions must be treated and accepted as a whole, and since Great Britain, France, Russia and Belgium had been unable to accept it without modification, the United States withdrew its proposal. At the same time it declared that it would insist that its rights and the rights of its citizens during the war be defined by existing rules of international law and the treaties of the United States, without regard to the Declaration of London.[5] Although the Declaration of London, as such,

4. The Declaration was signed by Austria-Hungary, France, Germany, Great Britain, Italy, Japan, the Netherlands, Russia, Spain and the United States, but was not ratified by any of the signatory powers. The proposed Prize Court has never been established.

5. "Diplomatic Correspondence between the United States and Belligerent Governments Relating to Neutral Rights and Commerce," *American Journal of International Law, Special Supplement* (1915), Vol. 9, p. 1-8. (In later footnotes, references to

was never in force during the war, many of its provisions were applied as correctly stating the existing rules of international law.

By 1914 the international law of neutral rights and obligations was a working balance between neutral and belligerent interests—the result of a long series of compromises founded less on logic than on custom and practice, fortified by treaties. The principle of this balance or compromise was that the neutral states agreed not to assist the military operations of the belligerents, and the belligerents agreed not to impair the non-military trade of neutrals, even with the enemy population.

PROBLEMS OF NEUTRALITY IN THE WORLD WAR

Of the entire body of neutral maritime rights, few rules went through the World War without being violated or, as the Allies said, "extended," "interpreted" or "brought up to date." Sir Edward Grey wrote later:[6] "The Navy acted and the Foreign Office had to find the argument to support the action; it was anxious work." During the World War belligerents upset the balance of neutral and belligerent rights, so laboriously developed over several centuries, and revived the twelfth century concept of banning almost all commerce with the enemy, denying the distinction between combatants and non-combatants. The difference between absolute and conditional contraband was wiped out. Admittedly illegal "measures of blockade" were employed to blockade neutral as well as enemy ports. The doctrine of continuous voyage was distorted. Rules of visit, search and seizure of neutral vessels on the high seas were flagrantly violated. Prize law was modified by presuming seized vessels guilty until they proved their innocence.[7]

The United States engaged Great Britain in a long and acrimonious diplomatic controversy over the calculated disregard of its neutral rights.[8] The British answer was that "changed conditions" justified a belligerent in modifying international law and adapting it to modern conditions. The United States denied this contention.[9] Until it entered the war the United States continued to protest without success against the legality of the Allied measures. After 1917 the United States ceased to press the issue of neutral rights, although it was careful to avoid the inference that it had waived or abandoned its position.

Theoretically, the position of the United States would seem to be that violations of the laws of neutrality did not affect the validity of the rules. In fact, however, the State Department, by an exchange of notes with Great Britain on May 19, 1927, accepted an arrangement under which some $1,500,000, plus a contingent four or five million dollars, was subsequently used to settle American claims arising out of British violations of American neutral rights. Great Britain, however, refused to concede that it had violated these rights. Each country merely "reserved" its position for the future.[10]

Since the World War, no successful effort has been made to clarify the rights of neutrals and belligerents. Proposals advanced by Senator Borah and others for restatement of the rules of neutrality in the field of maritime law have not been acted on—partly because of the conflict between those who wished merely restoration of the rules and those who desired their reformulation in the light of post-war developments in international organization. Since strong opposition to any restatement of the old principles of neutrality has been expressed in League of Nations circles, the League concept of neutrality must be examined at this point.

LEAGUE CONCEPT OF NEUTRALITY

Although some realists declare that in a world of mounting economic rivalry, political recrimination and armament competition the League of Nations Covenant and the Anti-War Pact are of only academic significance, these instruments may yet play an important part in the present diplomatic crisis in Europe. In March 1935 the German government announced the introduction of conscription, the formation of a military air force and the organization of an army of 36 divisions totaling

the *American Journal of International Law* will be cited as *A.J.I.L.*

6. Sir Edward Grey, *Twenty-Five Years, 1892-1916* (New York, Stokes, 1925), Vol. II, p. 110.

7. Cf. H. W. Briggs, *The Doctrine of Continuous Voyage* (Baltimore, Johns Hopkins Press, 1926); Briggs, "Neutral Rights and Maritime Law," Foreign Policy Association, *Information Service*, March 16, 1928; J. W. Garner, *Prize Law during the World War* (New York, Macmillan, 1927).

8. Cf. *Foreign Relations of the United States, Supplements on the World War, 1914-1918* (Washington, Government Printing Office, 1927-1933).

9. For recent refutations of the British contentions, cf. J. B. Moore, *International Law and Some Current Illusions* (New York, Macmillan, 1924); Thomas Baty, "Prize Law and Modern Conditions," 25, *A.J.I.L.* (1931), p. 625; E. G. Trimble, "Violations of Maritime Law by the Allied Powers during the World War," 24, *A.J.I.L.* (1930), p. 79; and particularly the forthcoming book on neutral rights by Philip Jessup and Francis Déak, parts of which have been published in 46, 47 and 48, *Political Science Quarterly* (1931-1933); 7, *Tulane Law Review* (1933); and 82, *University of Pennsylvania Law Review* (1934).

10. *U. S. Treaty Series*, No. 756. Cf. also E. M. Borchard, 21, *A.J.I.L.* (1927), p. 764.

450,000 to 500,000 men—in defiance of the military clauses of the Versailles treaty. On March 20 the French government, denouncing the illegal act of Germany, placed the dispute before the League of Nations.

According to one interpretation of the Covenant it would be possible for the League Council to authorize France and its allies to take military or economic sanctions against Germany, should the latter power continue to repudiate the Treaty of Versailles. The application of such sanctions might lead to a declaration of war by Germany. Under the jurisprudence of the Covenant the powers initiating sanctions in these circumstances might be acting legally, while Germany would presumably be the aggressor. Even if all League members did not actively cooperate in the application of sanctions, the League decisions would place the stamp of moral approval on the Allied cause.[11]

League machinery might also come into play should the German army suddenly occupy Austria, Danzig or Memel, with or without a declaration of war. The invaded country would presumably invoke the protection of the League, just as China did in its dispute with Japan in 1931 and Abyssinia in its conflict with Italy in 1934. Should the League Council find that Germany had acted illegally and was the aggressor, it could authorize the great powers—Britain, France, Italy and the Soviet Union —to apply sanctions against Germany. The application of sanctions would actually constitute war in the old sense, but from the legal point of view the Allied powers and other members of the League might be joining in a "just war" against the German aggressor. Thus League machinery may be used to aid the Allied powers, morally at least, in their struggle with Germany. Under either of the above contingencies the question would arise whether the United States should insist on exporting munitions and other supplies to Germany as it did during the World War; place an embargo on such exports, while permitting the Allies freely to purchase in the American market; or impose embargoes or other restrictions on its trade with all belligerents. These questions can be answered only after analysis of the League of Nations system with relation to neutrality.

The classical concept of neutrality requires nonparticipation and legal impartiality on the part of the neutral. The state of neutrality, said Secretary of State John Quincy Adams in 1818, recognizes the cause of both parties as just; it avoids all consideration of the merits of the contest.[12]

11. In its note of March 20 to the League of Nations, France invoked only Article XI of the Covenant. It still remains possible, however, for France to invoke the more drastic Article XV.

During the World War, however, the concept of neutrality was subjected to criticism by the Allies. The neutral was branded a "slacker," preferring peace to fighting for "just causes." Henceforth every state should agree to take punitive measures against an aggressor. Historical justifications for this new conception were not lacking. It was pointed out that it was merely a return to the pre-Grotian conception of just and unjust wars. Attempts of the early publicists to make the distinction between just and unjust wars a rule of law failed because, as an abstract proposition, it was impossible to determine the justice or injustice of a particular war.

IMPLICATIONS OF LEAGUE COVENANT

The League Covenant attempted to meet this need. League members agreed to submit their disputes to the Council, and not to go to war in case the League Council made a unanimous recommendation.[13] Should a state embark on war in violation of its obligations as determined by League machinery, the League Council could authorize the imposition of sanctions against the "aggressor." Although the United States did not accept the obligations of the League Covenant, it became a party to the Anti-War Pact of 1928, under which each party agreed to renounce war as an instrument of national policy.

Both the League Covenant and the Anti-War Pact placed the old conception of neutrality in a different light. No state, it was argued, once it had associated itself in an international movement against the institution of war, could remain neutral without exhibiting "sheer indifference toward just causes." On the contrary, Article XVI of the Covenant provided that, should any League member illegally resort to war against any one state, "it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League" and these members should agree to impose against the aggressor an economic and financial boycott.[14]

12. J. B. Moore, *A Digest of International Law* (Washington, Government Printing Office), Vol. VII, p. 860. Cf. also, "Neutrality is based on the principle that both belligerents, whatever the justice of their respective causes, have an equal right to resort to war." J. B. Whitton, "What Follows the Pact of Paris?" *International Conciliation*, January 1932, p. 45; also Whitton, *La Neutralité et la Société des Nations* (Academie de droit international de la Haye), Tome 17 (1927-II).

13. The votes of the parties are not counted, however, in calculating unanimity. Should the Council fail to reach a unanimous report, "the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice."

14. An examination of the Covenant shows that neither war nor neutrality are forbidden League members in all cases. Cf. W. Schücking and H. Wehberg, *Die Satzung des Völkerbundes* (Berlin, Vahlen, 2nd ed.), p. 514, 597, 513.

Originally many commentators interpreted the Covenant to mean that all League members were bound to take action against an aggressor state and that neutrality and a League of Nations were mutually exclusive concepts.[15] A reaction soon occurred against this literal interpretation. In the first place it was contended that any effort thus to outlaw the use of unilateral force until after further progress had been made in removing the causes of war was bound to break down, and that under such circumstances no state indirectly concerned in a controversy could be expected to employ sanctions involving the risk of war against an aggressor. Secondly, it was declared that the imposition of a complete economic and financial embargo against an aggressor by League members raised the possibility of a conflict with the United States, which had not joined the League. So long as the attitude of Washington remained uncertain, League members feared that the United States would protest against a League blockade in an effort to enforce the neutral rights it attempted to sustain during the first three years of the World War. As late as November 1934 Mr. Stanley Baldwin, leader of the British Conservative party, said at Glasgow: "Never so long as I have any responsibility in governing the country will I sanction the British Navy being used for an armed blockade of any country in the world until I know what the United States of America is going to do."[16]

Under the influence of similar considerations, the Second Assembly (1921) adopted a new interpretation declaring that a breach of the Covenant does not automatically create a state of war but merely entitles other members of the League to resort to acts of war. Moreover, each member can decide for itself when and what sanctions to apply against an aggressor and whether or not such sanctions constitute war.[17] Under this interpretation the League may find that a given state has gone to war illegally. But such a decision merely authorizes any member of the League to apply sanctions against this state without obliging it to do so. A situation may arise, therefore, in which one member has legally gone to war against an aggressor, another has decided to employ economic sanctions falling short of war, while still other League members may decide to remain neutral. This interpretation obviously weakens the entire system of security envisioned by the authors of the League Covenant.

From 1924, when the ill-fated Geneva protocol was negotiated, until the security measures proposed to the League Disarmament Conference in 1933, efforts were made to strengthen the system of sanctions at least on a regional basis. In an attempt to remove the obstacles created by this country's uncertainty as to neutral rights, many students and statesmen also sought to reconcile the new League theories with the interests of the United States.

THE ANTI-WAR PACT AND NEUTRALITY

In some circles it was hoped that the conclusion of the Anti-War Pact of August 25, 1928, which was accepted by the United States as well as nearly all League members, would provide an answer to this problem. The British government in a White Paper published in 1929 stated that the effect of the Covenant and the pact "taken together is to deprive nations of the right to employ war as an instrument of national policy, and to forbid the States which have signed them to give aid or comfort to an offender . . . In other words, as between Members of the League, there can be no neutral rights, because there can be no neutrals."[18] According to Professor Quincy Wright: "Wars of aggression under those instruments are no longer moral offenses against the victim alone, but legal offenses against every state party to these multilateral treaties." For the United States, he continues, the Kellogg pact alone has made neutrality illegal; it is clear that "by ratifying the Kellogg Pact, the United States gave up the rights of neutral trade with violators of the Pact and was relieved of the duties of neutrality for the benefit of such states, and furthermore that in every future war one or more of the belligerents would inevitably be a violator of the Pact."[19]

15. Message of the Federal Council of Switzerland to the Federal Assembly of Switzerland concerning . . . the Accession of Switzerland to the League of Nations, August 4, 1919, p. 129, 25.

16. *The Times* (London), November 24, 1934.

17. The Council, however, could make recommendations on such subjects. Cf. League of Nations, *Reports and Resolutions on the subject of Article XVI of the Covenant,* Document A.14.-1927.V., p. 42. Cf. also Bruce Williams, *State Security and the League of Nations* (Baltimore, Johns Hopkins Press, 1927), p. 148 and Chap. IV *passim*.

18. Great Britain, Foreign Office, *Memorandum on the Signature by His Majesty's Government in the United Kingdom of the Optional Clause of the Permanent Court of International Justice* (London, H. M. Stationery Office, 1929), Cmd. 3452, p. 9-10.

19. Quincy Wright, "Neutrality and Neutral Rights Following the Pact of Paris for the Renunciation of War," *Proceedings,* American Society of International Law (1930), p. 79, 81, 84. Cf. James T. Shotwell, *War as an Instrument of National Policy* (New York, Harcourt, 1929), p. 222. Cf., however, comments by Hudson, Murdock, Borchard, etc., *idem.;* also, M. O. Hudson, "The Budapest Resolutions of 1934 on the Briand-Kellogg Pact of Paris" (*29, A.J.I.L., 1935,* p. 92-94), which recommends that:

"3. A signatory State which aids a violating State thereby itself violates the Pact.

"4. In the event of a violation of the Pact by a resort to armed force or war by one signatory state against another, the other States may, without thereby committing a breach of the Pact or of any rule of international law, do all or any of the following things:

"(a) Refuse to admit the exercise by the state violating the

Nevertheless, the conclusion of the Anti-War Pact did not remove uncertainty concerning the future of neutrality. It was pointed out that a whole series of post-war treaties concluded by members of the League continued to refer to neutrality or neutral rights, and that the Permanent Court of International Justice and various committees of the League of Nations assumed that neutral rights and duties still existed.[20] When Paraguay declared war on Bolivia on May 10, 1933, Uruguay, the Argentine Republic, Peru, Chile and Brazil issued declarations of neutrality.[21] All of these states, except Brazil, were members of the League, and Chile and Peru had adhered to the Kellogg pact. Judge John Bassett Moore has recently written:

"As a life-long student and administrator of international law, I do not hesitate to declare the supposition that neutrality is a thing of the past to be unsound in theory and false in fact. There is not in the world today a single government that is acting upon such a supposition. Governments are acting upon the contrary supposition and in so doing are merely recognizing the actual fact."[22]

UNITED STATES NEUTRALITY AND THE LEAGUE

From the legal point of view, the danger of a conflict between the United States and a League blockade does not seem as great as some observers believe. Should all League members engage in war against a Covenant-breaking country they could prevent any direct trade between that country and the United States in accordance with the traditional rules of international law. That is, they could establish a joint blockade of the ports of the Covenant-breaker and exercise the rights of contraband, continuous voyage and un-neutral service. Nor should the problem of indirect trade between the United States and a Covenant-breaking country prove difficult. Since nearly every state in Europe[23] belongs to the League, the obligation of preventing goods from reaching the territory of a Covenant-breaker would rest on adjacent League members. Under such circumstances, the occasion for seizing American vessels bound for states bordering on Germany should not arise as it did during the World War, when most of these states were neutral.

Greater uncertainty would undoubtedly arise should economic sanctions be applied against an aggressor by a few League members. This problem would be similar for League states which refrained from sanctions and for the United States.

Although the danger of a clash between the United States and League members in a League war is probably exaggerated, difficulties will unquestionably be encountered in drawing the line between what is contraband and non-contraband. Moreover, a real conflict might arise should League members attempt to apply sanctions, such as pacific blockade, boycott and embargo falling short of war *de jure*.[24] The United States has always refused to recognize any interference with its commerce by powers establishing a pacific blockade.[25]

Should the United States insist on the unrestricted right to trade with a state deemed to be the aggressor by the League of Nations, would it not defeat the application of League sanctions against such a state and thereby undermine the effort to do away with the instrument of war?

In an effort to solve this problem Representative Theodore E. Burton introduced a resolution into the House of Representatives on December 5, 1927 declaring that it is the policy of the United States to prohibit the exportation of arms or munitions of war to "any country which engages in aggressive warfare against any other country in violation of a treaty, convention, or other agreement to resort to arbitration or other peaceful means for the settlement of international controversies." The determination of who was the aggressor was left to the President of the United States. The original draft,

pact of belligerent rights, such as visit and search, blockade, etc.;

"(b) Decline to observe towards the State violating the Pact the duties prescribed by international law, apart from the Pact, for a neutral in relation to a belligerent;

"(c) Supply the State attacked with financial or material assistance, including munitions of war;

"(d) Assist with armed forces the State attacked."

20. For further evidence, cf. Philip Jessup, "Is Neutrality Essential?" *Proceedings*, American Society of International Law (1933), p. 134ff; J. B. Moore, "An Appeal to Reason," *Foreign Affairs* (1933); H. A. Smith, "The Future of Neutrality," 143, *Contemporary Review* (1933), p. 314ff.

21. Cf. G. G. Wilson, 27, *A.J.I.L.* (1933), p. 724.

22. J. B. Moore, "The New Isolation," 27, *A.J.I.L.* (1933), p. 607, 622.

23. Germany's resignation cannot take effect until October 19, 1935. Cf. League of Nations, *Official Journal*, January 1934, p. 16.

24. For the difference between war and acts falling short of war under the Covenant, cf. R. L. Buell, "The Weakness of Peace Machinery," *Foreign Policy Reports*, September 14, 1932. On the other hand, there is always the danger that a state against which pacific sanctions are imposed may retaliate with a declaration of war. On May 18, 1934 Mr. Stanley Baldwin stated: "There is no such thing as workable sanctions which does not mean war. If we adopt sanctions we must prepare for war."

25. Cf. "American Neutrality and League Wars," Foreign Policy Association, *Information Service*, March 30, 1928, p. 28; also League of Nations, "Legal Position Arising from the Enforcement in Time of Peace of the Measures of Economic Pressure indicated in Article XVI . . . particularly by a Maritime Blockade," *Report of the Secretary-General*, Doc. A.15.1927., May 17, 1927, p. 86, 88.

however, was modified in Committee to the effect that it is the policy of the United States to prohibit the export of arms "to any nation" which is engaged in war with another. In this form the Burton resolution maintained the traditional conception that a neutral should treat all belligerents impartially, without regard to the justice or injustice of their cause.

A second effort was made by Senator Capper,[26] who on February 11, 1929 introduced a resolution providing for the imposition of an arms embargo against any violator of the Anti-War Pact as determined by the President. Protection would be withdrawn from American nationals who sought profits from giving "aid to the aggressor." The United States was to negotiate with other signatories of the pact for adoption by them of similar measures. Senator Capper agreed that the adoption of his resolution would involve abandonment of our traditional policy of neutrality, but said that this policy must be superseded because of the Anti-War Pact.[27] Neither House of the American Congress, however, proved willing to adopt the Burton or Capper resolutions.

HOOVER'S EMBARGO MESSAGE

A third effort was made on January 10, 1933 when President Hoover, disturbed over the Chaco war, sent a special message to Congress requesting authorization to declare an arms embargo at his discretion. The resolution declared:

"Whenever the President finds that in any part of the world conditions exist such that the shipment of arms or munitions of war from countries which produce these commodities may promote or encourage the employment of force in the course of a dispute or conflict between nations, and, after securing the cooperation of such governments as the President deems necessary, he makes proclamation thereof, it shall be unlawful to export, or sell for export, except under such limitations and exceptions as the President prescribes, any arms or munitions of war from any place in the United States to such country or countries as he may designate, until otherwise ordered by the President or by Congress."[28]

This resolution, which would have given the President discretion to apply an arms embargo against an aggressor, was passed unanimously without discussion by the Senate on January 19, 1933, but was reconsidered a few weeks later. In view of the opposition of American munitions interests and others to an embargo on shipments, especially to the Orient, the House Foreign Affairs Committee on February 15, 1933 limited the application of the measure "to any American country." At this late date the pressure of more essential legislation prevented a vote on the bill, and it died with the session. Immediately after March 4, 1933 the Roosevelt Administration urged the adoption of a resolution identical with the original Hoover resolution, but without limitation to "American countries." The House passed this embargo resolution on April 17 by a vote of 253 to 109.[29] When the bill reached the Senate the Foreign Relations Committee inserted an amendment proposed by Senator Hiram Johnson, requiring that any arms embargo should apply to all parties to a dispute instead of to a single nation regarded as the aggressor by the President.[30] Although the amended resolution was passed by the Senate on February 28, 1934, the House adjourned without acting on the Senate amendment.[30a]

THE ROOSEVELT POLICY

On May 21, 1933, a few days before the Senate Committee amended the Roosevelt embargo proposal, Mr. Norman Davis, Ambassador-at-large, made an important offer to the Geneva Disarmament Conference—an offer which was contingent on conclusion of an agreement providing for a substantial and general reduction of military and naval armaments.

"We are willing," Mr. Davis declared, "to consult the other states in case of a threat to peace, with a view to averting conflict. Further than that, in the event that the states, in conference, determine that a state has been guilty of a breach of the peace in violation of its international obligations and take measures against the violator, then, if we concur in the judgment rendered as to the reprehensible and guilty party, we will refrain from any action tending to defeat such collec-

26. 70th Congress, 2nd Session, S.J. Res. 215.

27. Arthur Capper, "Making the Peace Pact Effective," 144, *Annals of the American Academy of Political and Social Science* (1929), p. 40-50.

28. U. S. Senate Doc. No. 169, 72nd Congress, 2nd Session. For a discussion, cf. Russell M. Cooper, *American Consultation in World Affairs* (New York, Macmillan, 1934).

29. 73rd Congress, 1st Session, House Report No. 22 to accompany H. J. Res. 93.

30. This amendment was reported out on May 29. Cf. Report No. 101, H. J. Res. 93, 73rd Congress, 1st Session.

30a. In May 1934 the League Council unanimously recommended the imposition of an arms embargo upon both Bolivia and Paraguay. President Roosevelt forwarded a similar request to the American Congress, as a result of which the Act of May 29, 1934 was passed prohibiting the sale of arms to both parties. *Congressional Record*, p. 9715. On January 16, 1935 the League advisory committee, implying that Paraguay was the aggressor, expressed the opinion that the prohibition of arms "should not continue to be enforced against Bolivia." C.54.24.-1935.VII. Thereafter a number of League states lifted the embargo against Bolivia, while the United States continued to prohibit the sale to both Bolivia and Paraguay.

tive effort which these states may thus make to restore peace."[31]

Under such a program the United States would consult with other states, presumably at Geneva, with a view to preventing a dispute from culminating in war. The United States would not itself participate with League members in actively imposing sanctions against an aggressor; but should the League Council name an aggressor, and should the United States, acting independently, agree, then this country would not attempt to enforce its neutral rights so as to defeat the application of League sanctions against the aggressor. The action of the Senate Committee on Foreign Relations a few days later in insisting on an arms embargo against both belligerents was interpreted as a blow at the policy initiated by the President in Geneva.[32]

PROS AND CONS OF COOPERATION WITH LEAGUE

Opponents of legislation authorizing the United States to cooperate either actively or passively with League members against an "aggressor" contend, both in Congress and outside, that it is virtually impossible to determine by legal means which of two belligerents is really in the wrong. League supporters deny that this is true. In 1933 the Soviet government proposed to the Disarmament Conference what it regards as a satisfactory definition of an aggressor—any state which is the first to invade the territory of another state, with or without a declaration of war.[33]

Opponents of cooperation with the League also contend that any pledge by the United States to consult with League powers or even to waive American neutral rights on behalf of League members against an aggressor state, for instance Germany, would make the United States an ally of an anti-aggressor coalition. The question is raised, moreover, whether the United States can establish an embargo on the shipment of arms to one belligerent and not the other without violating its legal obligations as a neutral. Professor Joseph P. Chamberlain states[34] that League members applying an arms embargo against one belligerent only "would not be open to any charge of illegal action or a failure to observe the duties of neutrality" because "Article XVI is a contract between the countries signing the Covenant under which each of them agrees that if it commits the specified breaches it will suffer the sanctions to be applied." For non-members of the League, however, "an embargo against one of the belligerents would be a violation of neutral duty" (citing Art. 9 of Hague Convention V of 1907).[35] Other authorities contend, however, that no signatory of the Anti-War Pact which goes to war in violation of that pact can demand that other parties apply the rules of neutrality to it.[36]

To remove doubts as to the legality of an embargo limited to one belligerent, the conclusion of an international agreement implementing the Anti-War Pact has frequently been proposed. The signatories of such an agreement would consent to the imposition of this type of embargo against a state which violates the Anti-War Pact.

Some Americans who supported the declaration made by Norman Davis to the Disarmament Conference point out that it is one thing for the United States to cooperate with the League of Nations in applying sanctions when the League has succeeded in securing the reduction of armaments and promoting world economic and political cooperation. But it is quite a different matter for the United States to cooperate when the League of Nations has failed in its major objectives and when it is in danger of becoming the instrument of an anti-German coalition in Europe. They point out that no great power has really been willing to take a strong stand on behalf of international cooperation and that under the circumstances the United States, far from serving the cause of peace by waiving its neutral rights against the so-called aggressor, would further embitter the European struggle for the balance of power.

THE NEW ISOLATION

Some of the Americans who argue that the United States should not waive its neutral rights

31. Address by Mr. Norman H. Davis, Chairman of the American Delegation, before the General Commission of the Disarmament Conference at Geneva, May 22, 1933. U. S. Department of State, *Press Releases*, Weekly Issue, No. 191, p. 390. Mr. Davis also said the United States would participate in a system of adequate supervision of an armament convention.

32. Drew Pearson and Constantine Brown, *The American Diplomatic Game* (Garden City, N. Y., Doubleday, Doran, 1935), p. 377.

33. League of Nations, "Records of the Conference for the Reduction and Limitation of Armaments," Series B, *Minutes of the General Commission*, Vol. II, December 14, 1932-June 29, 1933 (Geneva, 1933), p. 234 *et seq.* In his statement of May 22, 1933 Ambassador Norman Davis also declared: "In the long run, we may come to the conclusion that the simplest and most accurate definition of an aggressor is one whose armed forces are found on alien soil in violation of treaties." *Press Releases*, May 27, 1933, cited.

34. J. P. Chamberlain, "Embargo as a Sanction of International Law," *Proceedings*, American Society of International Law (1933), p. 66-78.

35. Cf. E. M. Borchard, "Realism v. Evangelism," 28, *A.J.I.L.* (1934), p. 108-117; also C. C. Hyde, "The Boycott as a Sanction of International Law," *Proceedings*, American Society of International Law (1933), p. 34ff; Hyde and L. B. Wehle, "The Boycott in Foreign Affairs," 27, *A.J.I.L.* (1933), p. 1.

36. Shotwell, *War as an Instrument of Policy*, cited, p. 223. Cf. also footnote 19.

against any state deemed an aggressor by the League do not insist that this country support the traditional view of neutral rights as it did during the World War. They believe that the question whether such rights should be enforced depends less on international law than on the material welfare of the American people. Certain business interests in this country may have profited from European trade with the belligerents between 1914 and 1917, but it needs no demonstration to show that the participation of the American people in the European war cost them many hundred times the profit they derived from neutral trade. Opinion may differ whether the United States went to war against Germany because of a desire to enforce neutral rights, to protect national honor, or to avenge the death of Americans on the high seas by German submarines. The fact remains that few of these controversies would have arisen had the United States, at the beginning of the World War, imposed an embargo on the export of munitions to all belligerents, prohibited private loans to belligerents and announced that it would not protect any American citizens attempting to carry on certain types of neutral trade in specified danger zones. It is consequently argued by some that the United States should abandon its pre-war conceptions of neutrality as a matter of national interest.

WARREN'S PROPOSALS

In a recent series of articles[37] Mr. Charles Warren, from 1914 to 1917 Assistant Attorney General in charge of enforcing our neutrality statutes in the United States, has declared that in order to keep out of future wars between great powers this country must do far more than remain technically neutral.

"In order to avoid friction and complications with the belligerents, it must be prepared to impose upon the actions of its citizens greater restrictions than international law requires. It must also be prepared to relinquish many rights which it has heretofore claimed and asserted, and to yield to contentions by belligerents, hitherto denied by it, with respect to interference with the trade and travel of its citizens on the high seas if the interests of the belligerents seem to them to so require. This is not a statement of any theoretical condition; it is the necessary conclusion from what took place in the World War."

Holding that an adequate policy cannot be improvised after the outbreak of war he urges "preparedness for neutrality"—not merely by officials, but by the American people, who "themselves must be prepared, in their mental attitude" for the sacrifices adherence to neutrality will entail. To achieve this end he suggests a two-fold program; immediate revision of our neutrality statutes, and negotiations to obtain the "utmost concessions" from the belligerents when a war breaks out.

The possibility of revising our neutrality policy was forecast in December 1934, when it became known that the State Department was making a survey of the question, and again in April 1935, when the Senate Munitions Committee announced that it was considering legislation to control or prohibit export of munitions and contraband in time of war. While the Munitions Committee did not undertake to review the whole question of neutrality, individual members of the Committee and other senators outlined the first steps of a program designed to keep the United States from being drawn into another war. These proposals were as follows:

(1) the imposition of an embargo on arms and ammunition to all belligerents upon the outbreak of war.

(2) the imposition of a similar embargo on public and private loans to belligerent nationals or governments.

(3) the refusal of passports to American citizens traveling in war zones.

(4) the announcement of a policy to the effect that American exporters would ship at their own risk all articles or goods declared to be contraband by the belligerents in time of war.

Since the lists of contraband published by the belligerents in the World War included virtually every important article of commerce, and extended to trade with other neutrals as well, the adoption of the fourth proposal would deny protection to most American foreign trade.

Another proposal is that the export of all articles declared to be contraband of war by any belligerent shall be at the risk of the exporter or shipper, provided, however, that the American government would reserve the right, at the end of the war, to present to the belligerent governments claims of damages with respect to any violation of rights recognized by international law.

DISCRETIONARY OR MANDATORY POWERS?

According to one view, Congress should give the President discretion to adopt any or all of these policies upon the outbreak of war. It is declared that should Great Britain be a neutral in a future war, the United States could enforce its traditional view

37. Charles Warren, "Troubles of A Neutral," *Foreign Affairs* (April 1934), p. 377-394; "What are the Rights of Neutrals Now, in Practice?" *Proceedings*, American Society of International Law (1933), p. 128-34; "Contraband and Neutral Trade," Academy of Political Science, November 7, 1934: "Prepare for Neutrality," *The Yale Review*, Spring, 1935.

of neutral rights with little fear of being drawn into the conflict—a view which seems to overlook the danger of submarines and aircraft on the part of other powers. Even in a war to which Great Britain is a party, the President should have the power to negotiate with belligerents in an effort to induce them not to interfere with certain types of American trade with neutrals provided that American vessels carrying such trade are specially marked.[38] Another suggestion is that belligerents might freely purchase all goods from the United States except munitions, provided they are transported in belligerent merchant ships. If, in connection with these negotiations, the President had authority to impose quotas on trade with both belligerents and neutrals, the exports of the United States would avoid confiscation; while the type of dispute which arose during the World War might be avoided.

According to a different view, Congress should enunciate in peace time a policy which the American government will follow on the outbreak of hostilities to which it is not a party. To vest complete discretionary powers in the hands of the President would increase his vast responsibilities in regard to the questions of peace and war. It is pointed out that the President already has wide authority over such matters. For example, following the sinking of the *Lusitania* in 1915, the German government proposed to the United States a plan under which German submarines would be instructed to permit the "free and safe passage" of a given number of passenger steamers flying the American flag, "when made recognizable by special markings and notified a reasonable time in advance"; on the tacit understanding that the United States guarantee that these vessels carried no contraband.[41] President Wilson had the power to accept this proposal; had he done so, the United States would presumably not have gone to war with Germany. In rejecting this offer the President acted in complete independence, not being guided by any clear expression of policy from Congress. It is contended that any legislation expressly conferring complete discretion on the President with regard to enforcement or waiver of neutral rights is unnecessary; what is needed is peace-time legislation by Congress stating the intention of the United States to remain aloof from any foreign war and making mandatory the imposition of an arms embargo on both belligerents and similarly prohibiting loans on the outbreak of war.

38. Cf. E. W. Crecraft, *Freedom of the Seas* (New York, Appleton-Century, 1935), especially Professor Borchard's introduction. Professor Crecraft seems to favor a "stoppage at the source" plan under which the American government would enforce a munitions embargo provided it were assured "in return that belligerent seizures of the kind that in the past have forced it to go to war" would cease. He suggests that belligerents promise not to molest food cargoes and other innocent articles of commerce (p. 227).

41. *Foreign Relations, 1915, Supplement,* Note of July 8, 1915, p. 465.

OBJECTIONS TO ISOLATION POLICY

An argument often made against the "new isolation" is that it will really work to the advantage of one belligerent against another. Supposing that, if war occurs in Europe, the United States imposes an embargo on the export of war material equally to Germany and the anti-German powers. In the absence of such an embargo, the anti-German powers would be strong enough to impose an iron-clad blockade against Germany, while freely purchasing munitions from the United States. The imposition of an embargo, however, would close the American market to the anti-German powers and thus prove of great advantage to Germany. In view of the unpopularity of the Hitler régime in the United States, is it likely that the American Congress would adopt a policy which would assist the Nazis in their effort to dominate Europe? Is a policy which works toward this end desirable?

Another difficulty created by this policy was pointed out in a note of August 12, 1915 to the Austro-Hungarian government. Secretary Lansing declared:[42]

"The general adoption by the nations of the world of the theory that neutral powers ought to prohibit the sale of arms and ammunition to belligerents would compel every nation to have in readiness at all times sufficient munitions of war to meet any emergency which might arise and to erect and maintain establishments for the manufacture of arms and ammunition sufficient to supply the needs of its military and naval forces throughout the progress of a war. Manifestly the application of this theory would result in every nation becoming an armed camp, ready to resist aggression and tempted to employ force in asserting its rights rather than appeal to reason and justice for the settlement of international disputes . . . The principles of international law, the practice of nations, the national safety of the United States and other nations without great military and naval establishments, the prevention of increased armies and navies, the adoption of peaceful methods for the adjustment of international differences, and, finally, neutrality itself are opposed to the prohibition by a neutral nation of the exportation of arms, ammunition, or other munitions of war to belligerent powers during the progress of the war."

It is declared that these principles are as sound today

42. *Foreign Relations, 1915, Supplement,* p. 796, 798.

as they were in 1915 and would be violated by adopting the "new isolation" formula.[43]

Finally, it is argued that the American people would not be willing to pay the price which real isolation involves. A government which is unable to dispose of the inter-Allied debt question is not strong enough to renounce even greater foreign interests, especially during an unprecedented depression. The outbreak of war in Europe would produce, temporarily at least, an economic boom in the United States, if American businessmen and farmers were allowed freedom to export. An administration which is having difficulty in curbing vested interests in peace time or in making fundamental progress in social reconstruction would find it still more difficult, it is contended, to resist pressure for trade—whether it comes from the steel producers of the industrial east, the cotton farmers of the south, or the wheat farmers of the middle west. Until the American economic system is so reorganized as to eliminate the private profit motive or until a government is established which completely dominates special interests, it will be extremely difficult for the United States, according to this view, to adopt a policy of economic self-containment on the outbreak of a major war. President Jefferson found it virtually impossible to enforce the Embargo Act of 1807 forbidding all ships to leave our harbors for foreign ports.[44] At the present time, when the world is much more interrelated than it was a hundred years ago, will not the difficulties in enforcing wartime embargoes prove even more serious?

Considerations of national prestige may also hamper the adoption of the new isolation policy. If the United States did not defend the rights of Americans abroad, belligerents would go to any lengths in prosecuting the war. American property in belligerent countries might be confiscated without fear of protest from Washington; American shipping, attempting to run a belligerent blockade at its own risk, might be sunk either by submarines or airplanes. Even though the State Department may have previously announced that the American government would not defend such interests when injured, vociferous elements of public opinion both in and out of Congress would declare that national honor had been violated, and that a nation which did not defend its rights abroad might prove an easy prey to invasion. Those who hold this view believe that for reasons of economic profit and national prestige the United States will eventually enter the next world war just as it did in 1917.

THE TWO ALTERNATIVES

Americans who concede the difficulties which would be created by the new isolation[45] have a choice of two major alternatives. The first is to adhere more closely than in the past to the principles of power-politics, under which the United States would build up a powerful army, navy and air force for the purpose of defending its "interests" in any part of the world, while at the same time retaining freedom of action as far as international commitments are concerned. The second is to adopt a positive policy of international cooperation. This alternative would involve measures of international economic planning, tariff reduction, monetary stabilization, entrance into the World Court and the League of Nations, and acceptance of certain commitments with regard to security. The way to keep out of war is to prevent war from taking place. There are no signs, however, that the United States or any other country is willing to make the sacrifices necessary to develop a policy of international cooperation under which the legitimate international interests of all countries would be advanced and the prevention of war insured.

43. The practice of neutrals in past wars with regard to carrying contraband has varied. Cf. Lester H. Woolsey, 22, *A.J.I.L.* (1928), p. 611.

"In the Crimean War, most of the European neutrals prohibited their ships from carrying contraband, and some of them prohibited the exportation of contraband altogether. Prussia, however, actually authorized trade in contraband. During the Civil War in the United States, Germany and England furnished the North and South with munitions."

In the Franco-Prussian War, despite Prussian protests, Great Britain and the United States shipped war-like stores to France. "However, Austria, Belgium, Denmark, Italy, Spain and Switzerland prohibited the exportation or transit of such articles. Sweden, Portugal and Spain restricted the transportation of war supplies, while Chile and Peru prohibited the sale of contraband.

"In the Russo-Turkish War, 1877-78, large shipments of guns were sent to Turkey and to Russia by the Krupps without objection on the part of belligerents, and England affirmed the right of her subjects to export arms to Turkey. In the Spanish-American War of 1898, Holland, Sweden, Norway, Denmark, Portugal, Brazil, Haiti, China and Colombia placed more or less restriction on the exportation or transportation of munitions. . ."

44. Cf. Henry Adams, *History of the United States of America during the Administration of Thomas Jefferson* (New York, Boni, 1930 ed.), Chaps. 11-15.

45. Mr. Warren himself doubts whether the United States is willing to pay the price for real isolation. He recently declared that he personally favored positive international cooperation. Cf. Warren, "The Troubles of a Neutral," cited.